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IN THE
COURT OF APPEALS OF INDIANA

JOHN D. GREENLEE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 84A05-0509-CR-526
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VIGO SUPERIOR COURT, DIVISION I
The Honorable Michael H. Eldred, Judge
Cause No. 84D01-0503-FB-803

November 6, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant John D. Greenlee appeals from his conviction for Robbery,[1] a class C felony. In particular, Greenlee argues that the prosecutor committed misconduct by stating during his closing argument that defense counsel's common practice is to "throw up a smoke screen in front of" the jury. Tr. p. 355. Finding no error, we affirm the judgment of the trial court.

FACTS

On March 24, 2005, the State charged Greenlee with class B felony robbery. Following Greenlee's jury trial, which began on July 11, 2005, the prosecutor made a closing argument in which he included the following statement:

> Ladies and gentlemen, what you just heard from Mr. Rader and the defense is a common practice in cases such as this. It is a tactic they use to try and throw up a smoke screen in front of you and divert the facts away from their [sic] person they represent and blame everybody else. I don't think he missed to [sic] many. Of all the witnesses, the victims, the police, the other witnesses on the stand, of blaming them. But that's, that's a common tactic.

Tr. p. 355-56. Greenlee did not object to the prosecutor's comments. On July 13, 2005, the jury found Greenlee guilty of class C felony robbery, and on August 15, 2002, the trial court sentenced Greenlee to an enhanced sentence of six years of incarceration. Greenlee now appeals.

[1] Ind. Code § 35-42-5-1.

DISCUSSION AND DECISION

Initially, we observe that Greenlee did not object to the prosecutor's comments at the time of trial. Consequently, he has waived this argument. See Malinski v. State, 794 N.E.2d 1071, 1084 (Ind. 2003) (holding that the failure to make a contemporaneous objection to alleged improper argument constitutes a waiver of any such claim for appeal). Moreover, Greenlee does not claim that the prosecutor's statement constitutes fundamental error. Assuming that he had made such an argument, we note that under these circumstances, the defendant must establish the grounds for prosecutorial misconduct and for fundamental error. Booher v. State, 773 N.E.2d 814, 818 (Ind. 2002). To establish fundamental error, the defendant must demonstrate that the alleged error resulted in a substantial and blatant violation of basic principles rendering the trial unfair to the defendant and depriving the defendant of fundamental due process. Carter v. State, 738 N.E.2d 665, 677 (Ind. 2000).

Claims of prosecutorial misconduct generally require a court to determine whether the prosecutor's actions constituted misconduct and whether that misconduct, considering all of the circumstances, placed the defendant in a position of grave peril to which he should not have been subjected. Wright v. State, 836 N.E.2d 283, 294 (Ind. Ct. App. 2005), trans. denied. The gravity of the peril depends on the probable persuasive effect of the misconduct on the jury's decision and not on the degree of impropriety of the misconduct. Id.

We have disapproved of similar statements made by prosecutors in the past. In Nevel v. State, we admonished the prosecutor—coincidentally, the same prosecutor involved in this case—for his improper statement:

> [W]e believe that on a case-by-case basis, the prosecutor may characterize the defense's evidence as "smoke and mirrors" if such is warranted. However, that is not what happened here. Rather, the prosecutor commented that it is a common defense tactic (or procedure commonly used by defense counsel) to distort the facts. We admonish counsel for such remarks. We believe such comments to have been improper, and in a more marginal case such improper comments could tip the balance unfairly, thereby justifying a reversal of a conviction.

818 N.E.2d 1, 5 (Ind. Ct. App. 2004). Inasmuch as the statements made by the prosecutor in Greenlee's case are nearly identical to those of which we disapproved in Nevel, we observe that this prosecutor is walking a very fine line. It so happens, as discussed below, that in this case he did not cross that line. But he need not have made the "smoke screen" comment to present his case effectively and we strongly caution him to think twice before including such inflammatory rhetoric in his arguments in the future.[2]

Here, the "smoke screen" comment specifically addressed the way in which Greenlee's attorney framed his closing argument. Specifically, counsel attacked the State's witnesses, blamed another man involved in the robbery and his girlfriend because they were convicted felons, and blamed the police for failing to conduct a thorough investigation. The prosecutor's "smoke screen" argument responded specifically to this tactic; consequently, though it was inflammatory and unnecessary, it was not improper argument. See Donnegan v. State, 809 N.E.2d 966, 973-74 (Ind. Ct. App. 2004) (finding that the prosecutor's comment that entire defense was "smoke and mirrors" was not misconduct because it concerned the quality of the defense and was a permissible comment on the evidence), trans. denied.

Additionally, we note that the comment at issue was merely a small portion of the State's closing argument, the majority of which was focused on specific references to the evidence and inferences to be drawn therefrom. Finally, the trial court instructed the jury that what the attorneys said in argument was not evidence and also informed the jury of the State's burden of proof and the presumption of innocence. See Gamble v. State, 831 N.E.2d 178, 184-85 (Ind. Ct. App. 2005) (holding that jury instructions served to lessen any persuasive effect that the alleged improper argument may have had), trans. denied. Under these circumstances, we conclude that Greenlee has failed to establish that the prosecutor's statement constituted misconduct or that it rose to the level of fundamental error.

The judgment of the trial court is affirmed.

VAIDIK, J., and CRONE, J., concur.

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[2] We have no intention of giving another free pass to this behavior in the future. In other words, as this author's drill sergeant would have said, knock it off.